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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FINANCIAL SERVICES VEHICLE
TRUST, etc.,

Plaintiff, Cross-defendant and
Respondent,

v.

SHERVIN ROOHPARVAR,

Defendant, Cross-complainant and
Appellant.

B216115

(Los Angeles County
Super. Ct. No. BC385733)

APPEAL from an order of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Shervin Roohparvar, in pro. per., for Defendant, Cross-complainant and Appellant.

Caley & Associates, Rebecca A. Caley and Tina M. Starr for Plaintiff, Cross-defendant and Respondent.

INTRODUCTION

Shervin Roohparvar (Roohparvar) appeals from the denial of his motion to set aside the summary judgment in favor of Financial Services Vehicle Trust, by and through its Servicer, BMW Financial Services NA, LLC., a Delaware Limited Liability Company (Financial). The judgment was entered after Roohparvar failed to respond to Financial's motion for summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On or about January 12, 2005, Nathaniel Batsell (Batsell) executed a written lease for a 2005 BMW, which Financial received by assignment. On or about June 12, 2005, Batsell defaulted under the terms of the lease. Before Financial recovered the BMW, on or about January 22, 2007, via forgery, the BMW was re-registered with the Department of Motor Vehicles (DMV) by Andre Barefield (Barefield). On June 28, 2007, Roohparvar purchased the BMW from Barefield. Financial's recovery agent recovered the BMW on or about July 13, 2007.

On February 19, 2008, Financial filed a complaint against Roohparvar, Barefield and DMV for quiet title, declaratory relief and permanent injunction. On March 21, Roohparvar filed an answer and a cross-complaint for declaratory relief, permanent injunction and quiet title, seeking a declaration that he was the rightful owner of the BMW.

On August 21, 2008, Financial filed a motion for summary judgment as to its complaint and Roohparvar's cross-complaint. On August 25, Roohparvar's counsel informed Financial's counsel that Roohparvar had agreed to stipulate to judgment on the complaint and dismiss the cross-complaint, without payment of any fees.

On September 22, 2008, Roohparvar's counsel sent an email to Financial's counsel indicating that the settlement documents were being forwarded to Financial for review. On October 2, Financial's counsel sent a follow up email, indicating that there

would be no agreement to continue the summary judgment motion. Roohparvar's counsel indicated that she understood and would convey the information to Roohparvar.

On October 16, Roohparvar informed his attorney he would no longer be using her services and requested the case files. He received them on October 27. Meanwhile, on October 23, the date that opposition to the summary judgment motion was due, Financial's counsel received a letter from Roohparvar indicating that he was in the process of "switching counsel" and requesting that the hearing date on the summary judgment motion be continued. Financial's counsel wrote back, explaining why the request for continuance would not be granted, including the depreciation of the BMW and the fact that he had previously told Roohparvar's counsel that no continuance would be given.

On October 30, Financial's counsel received an ex parte request to extend the time for service of opposition to the summary judgment motion. At the November 6 hearing on the motion, the trial court denied Roohparvar's request for an extension of time and granted Financial's motion. Judgment was entered on December 5.

On December 23, Roohparvar filed a motion to set aside the judgment under Code of Civil Procedure section 473,¹ contending that he should be relieved from the "default judgment" based on mistake of fact, surprise, excusable neglect and his attorney's inexcusable neglect. The trial court denied the motion on March 10, 2009. It explained that "it appears that [Roohparvar] was aware of the purported negligence of counsel far in advance to any opposition to the motion for summary judgment being due. Nevertheless, [he] failed to timely terminate counsel and retain new counsel, or take other action to secure his rights."

On March 27, 2009, Roohparvar filed a "motion to vacate judgment," purportedly under section 663, seeking to vacate the order denying his motion to set aside the judgment.

¹ All further statutory references are to the Code of Civil Procedure.

The trial court denied the motion on April 27. It ruled that the order denying Roohparvar's motion to set aside the judgment was not a "judgment" within the meaning of section 663, and the motion was untimely as to the summary judgment. Additionally, if construed as a motion for reconsideration under section 1008, Roohparvar's motion was procedurally defective because it was not supported by new facts, circumstances or law and it was untimely.

Thereafter, Roohparvar filed a notice of appeal from the March 10 order denying his motion to set aside the judgment.

DISCUSSION

Section 473, subdivision (b), permits the trial court to grant relief from a judgment, order or other proceeding taken against a party by "mistake, inadvertence, surprise, or excusable neglect." The provisions of this section are liberally construed in favor of the determination of actions on their merits. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256.) We review a trial court's action under section 473, subdivision (b), for abuse of discretion. (*Zamora, supra*, at p. 257; *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1354.) Discretion is abused when a decision is arbitrary or capricious, or it exceeds the bounds of all reason under the circumstances. (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249-1250.) An abuse of discretion must be affirmatively established. (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158.)

Roohparvar sets forth several bases on which he contends the trial court abused its discretion in denying his motion to set aside the judgment. We are not persuaded.

A. Interpretation of Roohparvar's Declaration

Roohparvar first asserts that the trial court based its denial of his section 473 motion on a misinterpretation of his declaration. We disagree.

In its ruling denying the motion to set aside the summary judgment, the trial court set forth in detail the basis for its ruling and addressed the issue of whether Roohparvar was entitled to discretionary relief under section 473. Its ruling stated, in part, the following:

“Here, [Roohparvar] argues that [he] discovered [his] counsel’s negligence, and terminated counsel around October 16, 2008. [Roohparvar] argues that in August, [he] discovered that [his] counsel had made a settlement offer which [Roohparvar] did not authorize. . . . Further, [Roohparvar] indicates that [he] did not receive [his] file until October 27, 2008, and that he attempted to secure a stipulation extending its time to oppose the pending motion for summary judgment, but that the request was denied by [Financial]’s counsel. . . . [¶] . . . Here, it appears that [Roohparvar] was aware of the purported negligence of counsel far in advance to any opposition to the motion for summary judgment being due. Nevertheless, [Roohparvar] failed to timely terminate counsel and retain new counsel, or take other action to secure his rights.”

If there is any confusion about when Roohparvar discovered any alleged misconduct by his attorney, it may be a result of his own declaration in support of the motion to set aside judgment. In his motion and declaration, Roohparvar states that he had questions about his counsel’s representation as early as August 15, 2008, and he was provided with a detailed accounting from his attorney on or about August 26, 2008. In his reply to Financial’s opposition to the motion, Roohparvar claims he first learned of representation problems in September 2008. He adds that he did not receive his file until October 27, 2008.²

In reviewing an order denying a section 473 motion, we “will not disturb the trial court’s factual findings where . . . they are based on substantial evidence.” (*Falahati v.*

² By contrast, in his opening brief on appeal, Roohparvar claims that he did not make his negligence discovery until “late September.” He states that he reviewed case files “in late September” when he learned of his attorney’s unauthorized settlement negotiations.

Kondo (2005) 127 Cal.App.4th 823, 828.) It is the province of the trial court to determine the credibility of declarants and to weigh the evidence. There is substantial evidence to support the trial court's finding that Roohparvar was aware of the purported negligence of counsel in August 2008, far in advance of the October 23 date that any opposition to the motion for summary judgment was due. By October 16, Roohparvar had requested the case files from his attorney. Despite having not received the case files in time to file his opposition to the summary judgment motion, Roohparvar did not go to court to seek a continuance of the proceedings until the November 6 hearing on the summary judgment motion. On this factual basis, we do not find a clear showing of abuse of discretion in denying Roohparvar's motion. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 257; *Ambrose v. Michelin North America, Inc.*, *supra*, 134 Cal.App.4th at p. 1354.)

It appears that Roohparvar may have been arguing that malpractice was committed by his attorney. The trial court was very clear in its ruling that the Roohparvar was not entitled to mandatory relief under section 473, subdivision (b).³ He was self-represented and filed no attorney declaration of fault with his motion. In addition, the mandatory provision of section 473, subdivision (b), cannot be construed to encompass a summary judgment, regardless of whether the omissions or failures by counsel may have preceded entry of the judgment. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1417; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 144.)

³ Section 473, subdivision (b), provides in pertinent part that "the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client"

B. Roohparvar's Negligence

Roohparvar submits two reasons why his negligence is excused. First, he claims that he had a medical condition of depression that resulted in difficulty monitoring his attorney's performance. Second, he claims that due to his business partner's son's health issues, his extra workload caused him difficulty in dealing with problems with his legal representation.

1. Medical Condition

Roohparvar stated in his declaration that he experienced depression for months prior to September 2008, but his condition worsened when he discovered the alleged ethical breaches of his attorney and he was unable to afford to hire a new attorney. The two cases he cites in support of his claim that this entitled him to relief are distinguishable.

In *Kesselman v. Kesselman* (1963) 212 Cal.App.2d 196, the defendant suffered a debilitating stroke and was still suffering from the effects several months later. There was a basis from which the court could conclude that he "was in a deteriorated mental condition and was not capable of understanding the significance" of the legal proceedings. (*Id.* at p. 207.)

Here, Roohparvar stated that he "started having feelings of depression as early as January 2008, and during the months leading up to October they intensified to the point of distracting [him] from completing tasks that [he] was normally able to complete." In October, he began seeing a psychiatrist who provided him with medication, which he did not pick up until October 28. A supporting letter from a psychologist said that she had been treating Roohparvar for "moderate to severe symptoms of depression and anxiety since October of 2008," when he was "struggling greatly with many debilitating symptoms of depression." Both documents are conclusory and contain no specifics as to how Roohparvar's condition prevented him from taking any action to protect his rights once he suspected his attorney of malpractice.

Moreover, Roohparvar also states in his declaration that when he and his business partner received an accounting from his attorney on August 15, they prepared questions for her. When she became defensive, they did their own research over the internet. In September, they reviewed the cross-complaint, had an acquaintance who knew law explain it to them, then demanded further information from their attorney. “It was at this point that [they] grew more and more suspicious of [their] lawyer, but having no past legal experience, [they] did not want to make rash decisions and were uncertain whether the problems [they] had discovered thus far justified firing [their lawyer].” They then made an appointment with another attorney for a second opinion. Nothing in the foregoing recitation of facts suggests that Roohparvar was so debilitated by depression and anxiety that he was unable to take steps to protect his rights.

The second case Roohparvar cites to excuse his negligence is also distinguishable. In *Robinson v. Varela* (1977) 67 Cal.App.3d 611, the court considered several factors in deciding that discretionary relief was justified, including the short period of time counsel had to file an answer, press of business due to the primary attorney’s illness, the limited hours available during Christmas week and other litigation matters. (*Id.* at p. 616.) Again, there was no showing here that Roohparvar’s illness actually prevented him from taking care of business. Under the circumstances, “[t]he trial court was well within its discretion when it concluded [Roohparvar] did not carry [his] burden of showing [his] neglect was excusable or [his] ‘surprise’ was caused ‘without any default or negligence of [his] own, which ordinary prudence could not have guarded against.’” (*Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 199.)

2. Roohparvar’s Business Partner’s Family Medical Issue

Roohparvar submits that because his business partner was experiencing personal emergencies from his son’s medical condition, which increased his own workload, that he should be excused from not timely filing opposition to the motion. We disagree.

The cases cited by Roohparvar are clearly distinguishable and deal with an attorney’s failure to take action. In *Huh v. Wang*, *supra*, 158 Cal.App.4th at page 1423,

the court noted that “‘press of business’ alone generally does not constitute grounds for relief” under section 473. Rather, “[t]o constitute grounds for relief, an exceptional workload generally must be accompanied by some factor outside the attorney’s control that makes the situation unmanageable, such as a mistake ‘caused by a glitch in the office machinery or an error by clerical staff.’” (*Id.* at p. 1424; *Ambrose v. Michelin North America, Inc.*, *supra*, 134 Cal.App.4th at pp. 1354-1355.) Even assuming these cases are applicable to Roohparvar, he points to no external factors which, in addition to his increased workload, justify relief.

Roohparvar also asserts that his case is similar to *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276. In *Gamet*, the trial court erroneously failed to consider Gamet’s alleged personal and family traumas, including permanent disability due to a shattered disc in her neck, living in South Dakota with her parents, having a brother who had recently died leaving two small children, being unable to work, having no money and not being able to travel without assistance. (*Id.* at pp. 1280, 1282.) In the instant case, however, Roohparvar’s alleged clinical depression and increased workload, while of concern, were certainly not nearly as significant as Gamet’s personal and family traumas that left her permanently disabled, living in South Dakota, and unable to travel. In addition, in *Gamet*, the record reflected an appearance of unfairness when the trial court stated it could “‘jam’” Gamet and it wanted to “‘keep the heat on.’” (*Id.* at p. 1283.) There are no similar comments in the record of the instant case that reflect an unfairness on the part of the trial court.

C. Mistake of Fact

Roohparvar contends he is entitled to relief based on a showing of “mistake of fact.” He argues that he discovered critical facts on October 27, 2008, regarding the purchase of the BMW and the alleged fraudulent transfer of the vehicle, and if he had known these facts earlier, he would have proceeded in the instant case in a different manner. Specifically, he claims that on October 27, 2008, he learned from an FBI investigator, David Hewitt (Hewitt), that Financial’s customer was responsible for

defrauding Financial. Had he known of this sooner, he would have initiated a lawsuit to establish rightful ownership of the BMW.

The facts belie Roohparvar's claim. Financial recovered the BMW in July 2007. Also in July 2007, Roohparvar met Hewitt, who told him that the BMW "had essentially been stolen." Hewitt told him the BMW "had been purchased by a 'Nathaniel Batsell,' who later 'gave' the car to an 'Andre Barefield.'" Barefield then "washed the title" and sold the car to Roohparvar.

Financial filed its lawsuit in February 2008. After Roohparvar was served with the lawsuit, Roohparvar filed a cross-complaint. Roohparvar fails to explain why he did not file his own lawsuit after Financial recovered the BMW and he learned about the fraud in July 2007. In short, there was no mistake of fact justifying relief.

Inasmuch as the trial court did not abuse its discretion in denying his motion to set aside the judgment, we need not address Roohparvar's arguments regarding a lack of prejudice to Financial if the motion were granted. Lack of prejudice alone does not justify setting aside a judgment. (Cf. *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1187.) Additionally, we need not address his arguments regarding the merits of the summary judgment, in that he did not appeal from the judgment. (*Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 436.)

DISPOSITION

The order is affirmed. Financial is to recover its costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

SEGAL, J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.